Austin, Texas

May 17, 1979

TO THE MEMBERS OF THE SENATE, STATE OF TEXAS, SIXTY-SIXTH LEGISLATURE; REGULAR SESSION:

Pursuant to the provisions of Section 14, Article IV of the Constitution of the State of Texas, I herewith return to you Senate Bill 1025 vetoed for the following reasons:

This bill is much broader than a similar bill of the Sixty-Fifth Legislature, Senate Bill 1226, vetoed by then Governor Dolph Briscoe. The Open Records Act of 1973 provides a proper balance between the citizen's right to access to public documents and records and a person's right to privacy from unwarranted disclosure of confidential information in their dealings with a governmental body.

This bill adds an accessibility provision which states that no information revelant to a civil or criminal proceeding shall be excepted from the Open Records Act, unless there is an express statement that the information is not subject to subpoena or shall not be used in court proceedings. There is some softening of this accessibility provision in that a court may refuse to order the disclosure upon a showing that the harm which would result from the disclosure outweighs the need of the litigants for the information.

Nevertheless, this accessibility provision would make available to a district or county court proceeding any information held by a governmental body, even though that information is within one of the exceptions to the Open Records Act, unless the statute creating the exception contained the express statement mentioned above. Present exemptions to the Open Records Act would be ignored without the express statement. The result of this would be to open up previously excepted matters like bank examinations, personnel files, bidding files, trade secrets, litigation files, and various other information deemed confidential by law. State employees would be caught in the bind of being prohibited by law from divulging certain material and then being ordered to divulge it for certain court proceedings.

This Act further provides that a person who substantially prevails in a writ of mandamus suit to compel a governmental body to make information available for public inspection may recover reasonable attorney's fees and other litigation costs reasonably incurred in the case. This would encourage litigation, and no provision is made for appropriations to governmental bodies to pay attorney's fees and the costs of litigation in lawsuits of this nature.

This Act, as passed, also left out an important provision in the original bill, which would have solved any conflict between the Open Records Act and federal privacy laws. This provision which was left out of the final bill provided that information could be withheld if its release would cause the denial of funds, services, or essential information from the federal government.

Attached to this message, and made a part thereof, are some specific examples of the problems caused by the accessibility provisions of Senate Bill 1025.

For these reasons, I hereby return to you unsigned Senate Bill 1025.

Respectfully,

William P. Clements, Jr.
Governor

Attachment

Specific Examples of the Problems Caused by the Accessibility Provisions of S. B. 1025

Texas Water Development Board. The Texas Water Development Board has, by rule, expressly exempted certain classes of information from public disclosure. In Rule No. 156.01.013, the Board has protected classified data of the federal government and confidential information relating to trade secrets, secret processes, or economics of operation from disclosure. The Board has also protected information relating to litigation in which the Department is a party. Once again, this information would be subject to disclosure under S. B. 1025, and the Department would have no alternative but to disclose information relating to trade secrets, secret processes, or litigation matters.

Bank examinations. Under Article 342-210, information obtained by the banking department as to the financial condition of state banks is declared to be confidential and shall not be disclosed by the Commissioner or any employee of the department with certain noted exceptions. Divulging information or permitting access to banking department files is a misdemeanor under Article 342-211. The Supreme Court has recently held that the confidential section of a bank examiner's report is not subject to discovery in a judicial proceeding but is privileged as Article 342-210 provides. Stewart v. Honorable Tate McCain, 22 Tex. Sup. Ct. Journal 136 (1978).

However, under S. B. 1025, bank examinations and other banking department files would be subject to disclosure since there is no express provision in the Banking Code providing that this information is not subject to subpoena. Thus, Article 342-210 would be effectively abrogated.

Under federal law, information gained in a bank examination by the Comptroller of the Currency or Federal Deposit Insurance Corporation may not be divulged without authorization and unauthorized disclosures by an examiner or employee are crinimal offenses. 18 U. S. C. 1906. By regulation, the Comptroller has placed all reports concerning financial institutions within the class of records not subject to disclosure. 12 C.F.R. Sec 4.16 (8). The Comptroller has also prohibited other government agencies and private parties from disclosing information concerning financial institutions, under threat of criminal prosecution. 12 C.F.R. Sec 4.18; 18 U.S.C. Sec. 461. Employees and former employees of the Comptroller are forbidden from testifying or responding to a subpoena without permission of the Comptroller.

Under S. B. 1025, then, state banks would suffer exposure of all files relating to them, no matter how speculative; while national banks would enjoy the protection of federal rules and statutes.

Administrative Appeals. Under the Texas Register and Administrative Procedure Act (Article 6252-13a), appeals from an order of a state agency are taken to the district court. An appeal, therefore, would be a case covered by S. B. 1025, and under the provisions added by the bill would be available. Using S. B. 1025, a party to an administrative appeal could seek to go beyond the order of the agency in question and place the mental processes of the agency administrators in issue. Because S. B. 1025 allows the discovery of "intangible knowledge", a party to an administrative appeal could seek to question the mental process by which a decision was reached, thereby expanding the scope of the appeal beyond the record made before the agency.

Savings and Loan Examinations. Article 852a, Section 11.18 of the Revised Civil Statutes, provides that, "Reports of examinations (of savings & loan associations) made to the Commissioner shall be regarded as confidential and not for public record or inspection ***." The statute also provides a criminal penalty for unauthorized disclosure of information by an examiner, inspector, deputy, assistant or clerk or the Commissioner. As with bank examinations, this statute would be effectively repealed by S. B. 1025, and the subjective analysis of the Commissioner would be subject to disclosure.

Attorney-Client Privilege. There is no statute in Texas which states that confidential information in the hands of an attorney is not subject to subpoena or shall not be used in court even though this is the long recognized rule at common law. Governmental entities can and do employ attorneys, including the Attorney General, to render professional advice and services. In this capacity, the governmental entity stands in the traditional shoes of the client. The effect of S. B. 1025 would be to require disclosure of confidential information which has passed from the attorney to his client, the governmental agency. The Open Records Act provides an explicit exception for matters which are protected by the attorney-client privilege. Article 6252-17a Sec. 3 (a) (7). This exception does not appear in the language added to the Act by S. B. 1025, and would not be available in a district court suit.